The Saudi and the American Mortgage Laws

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Abstract

This paper will present the existing mortgage laws that are being implemented in Saudi Arabia and United States and differentiate the process and the requirements that are needed for the approval of the mortgage transaction. There are four main objectives in this thesis: 1.) to present the essential mortgage laws in the United States and Saudi Arabia; 2.) to explain the implementation of mortgage laws in these two countries; 3.) The similarities between the mortgage laws of the two countries; and 4.) The differences of mortgage laws between the two countries. This study shall also show the efficiency of the current mortgage laws in the two countries and to provide recommendations to improve the effectiveness of these laws. Other issues that will be discussed are the factors that may affect the implementation of the mortgage laws in the two countries based on political, cultural, and social differences.

Keywords: Mortgage laws, security interest, Shariah, “rahn” principles, mortgagor and mortgagee.

Introduction

According to Wood (2007), mortgage is one of the controversial, but crucial factors in any given state because it has a close connection to the health of the economy, but affects also the well-being of society. Each country in the globe has established their respective rules and regulations with regard to mortgages of properties which ensure positive economic growth (Wood, 2007). According to Jasper (2008), after the recent global crisis which has significantly affected the economies of several countries, particularly, the United States, the mortgage laws of every nation have been questioned of their capability to achieve their objectives. Another country that had experienced the impact is Saudi Arabia. However, due to the recent development in the Arabian economy, the mortgage laws of the country have begun to move forward by improving the rules and regulations on the mortgage and real estate. For this study, the differences between western countries and the Arabian countries mortgage laws will be presented in detail, including the requirements, the process of implementation and the purpose of the regulations that can affected by cultural, social, and political factors. The proposed study will provide a detailed differentiation of mortgage laws between the two countries and the guidelines that are being observed in order to effectively carry-out the purpose of the law.

Overview of the U.S. Mortgage Laws

According to the Legal Information Institute of Cornell University Law School (2010), the concept of mortgage deals with the transfer of interest over a real estate property that was used as a security for a loan or a debt by the mortgagor. Mortgage is the most basic method among financing real estate transactions because it gives the mortgagor a sense of security that he or she will be able to recover the money lent to the mortgagor. On the part of the mortgagor, such individual has to submit a land or real estate property to obtain approval of the loan and executes a document that will transfer his or her interest over the property. In the United States, the most of the mortgagees are commonly the financial institutions or bank, which approves and grants the loan or other interest that was provided by the mortgagor who has offered it to the mortgagee in that will be traded for the security interest.

The mortgage agreement between the mortgagor and the mortgagee is divided into several installments that have to be paid in specific periods, which shall cover the principal amount and application of interest (Pinkowish, 2011). The non-payment of the debt on or before the due dates by the mortgagor shall lead in the foreclosure of the real estate property. It is through the method of foreclosure that the mortgagee is authorized to declare that the when the full mortgage debt is due and demandable, and order its immediate payment. Foreclosure of the security interest in a mortgage agreement is contained in an acceleration clause in the stated the agreement. Once the mortgage debt becomes due and the mortgagor did not pay his debt on time, chances are the security interest of the mortgage agreement will be foreclosed or seized by the mortgagee. The land, which is part of the security interest, will only be seized if there was default on the

part of the mortgagor. Once the property is seized, it can be subjected to a foreclosure sale to recover the losses of the mortgagee. The process of foreclosure process varies depending on the laws of the where the parties reside and contained in the terms and conditions of the mortgage agreement. In most occasions, it is the court which shall grant the order of judicial foreclosure or to allow the mortgagee to recover the principal debt and interest by selling the foreclosed property in a foreclosure sale,

Several states in the U.S. have regulated the provision of acceleration clauses which provides allowances for late payments to preclude the foreclosure of the mortgagor's properties. The instruments that are used in mortgages are often known as the traditional mortgages and may also be in the form of a Deeds of Trust (Legal Information Institute, 2010).

There are three theories that are being observed to entitle on to a legal title to a property that has been mortgaged. The three theories are: 1.) Title Theory; 2.) Lien Theory and Intermediary Theory. The first theory is the title theory wherein the security interest supports the mortgagee. Generally, several U.S. states, have been observing the lien theory whereby the legal title of the mortgaged property shall remain in the possession of the mortgagor, provided foreclosure has not yet taken place. The third theory is the intermediate theory which means that the lien theory will be applied until such time that the mortgagor has defaulted on his or her payments on the mortgage, thereafter it will now be the title theory that will applied (Legal Information Institute, 2010).

History of the U.S. Mortgage Laws

According to Pinkowish (2011), the mortgage laws in the U.S. if very unique in its features because the fundamentals of the law are founded based on common law in England after 900 years have passed. The classic common mortgage law originated in England after the Northern invasion occurred in 1066, and progressed into law during the 1400. There are two parties in a mortgage instrument, the mortgagor and the mortgagee. The basic process of mortgage involves an actual conveyance of the title wherein there is a transfer of the real estate property in the possession of the mortgagee. In the agreement between the mortgagor and the mortgagee, there is a defeasance clause which states that the mortgagee's title is defeated in the event that there actual payment on the part of the mortgagor on the date where the debt falls due, or also known as the law day (Pinkowish, 2011). Based on the agreement, the mortgagee shall have the right to retain profits and rents generated from the property while title is still in his or her possession. This became the acceptable arrangement since the mortgagee cannot charge interest on loan or usury because it was prohibited under the law. However, this practice was later on changed since interest was made legal, and the mortgagee has the obligation to credit the payment for rentals and profits to the mortgagor. The early mortgage agreement did not provide protection to the rights of the mortgagee in the event that the mortgagor defaults on the payment. The only remedy available at that time on the part of the mortgagee for the nonperformance of obligation of the debtor is the termination of the possibility of reversion founded on the defeasance clause Pinkowish (2011).

On the part of the mortgagor, the harsh penalty for nonperformance of obligation on the due date led them to file a petition to the kings for the inequitable practice of

punishing them even where they instances when they are not yet personally in default. The courts of equity finally gave a remedy to the mortgagors by allowing them to redeem the property by asking them to pay interest of debts which became due. According to Pinkowish (2011), this remedy was later became known was the equity of redemption. Due to this remedy given to the mortgagors, majority of the mortgagees were apprehensive to lend their money with security for fear that the mortgagor will eventually opt to redeem the real estate property used as the security. In order to strike a balance between the rights of the mortgagors and mortgagees, the court decided to allow the mortgagor the period of six (6) months to redeem their property. If after the sixth month had lapsed and the mortgagor has not yet redeemed the real estate, the equity of redemption will be cancelled or foreclosed in favor of the mortgagee (Pinkowish, 2011).

In the early American mortgage law system, the concept of mortgage involves the actual owner of the real estate as the person who serves it as a security for the performance of his obligation to the mortgagee. The mortgagee now becomes that legal owner of the real estate while it is still functions as a security. Such arrangement is known as the “title theory”, whereby the mortgagee hold title to the property while it remains to be outstanding but not yet in default. At least twenty-one (21) states in the U.S. have regarded themselves as title theory states. This concept was changed after the Revolution War, where it was held in court that the mortgagor did not lose the right over his or her real estate property that served as a security for the payment of debt. The right of the mortgagor on the continuing ownership interest over the real estate was acknowledged by the court. It was held further that the mortgage only served as a security interest for the mortgagee and as a result, the title to the real estate should stay under the

name of the mortgagor. Such concept was later known as the “lien theory”, which recognized that the title shall remain to the mortgagor while the status of the debt is still outstanding, and the mortgagor has not yet defaulted in payments. Currently, there are about 28 states who have adopted the “lien theory”. In both theories: the “title theory” and the “lien theory”, the states acknowledge that the mortgagor is the legal owner of the real estate. The only difference lies between the two theories depends on the manner of foreclosure.

The mortgagors are given the liberty to manage the real estate that is the subject matter of the mortgage provided that the activity will not disturb the security interest of the mortgage. The third theory is the intermediate theory whereby there is application of the lien theory in the event that the mortgagor has defaulted on the mortgage and thereafter the title theory will then become operative (Legal Information Institute, 2010).

The present American law on mortgage allows that any interest in real estate that can be sold can be mortgaged which may include the lease, life estate or a fee simple (Pinkowish, 2011). This shall be dependent on the will of the mortgagee is such person is willing to lend money and has accepted that arrangement using that specific interest as security.

The Mortgage Process in the United States

The process of mortgaging a property in the U.S. starts with the consent of the mortgagee or the lender to grant the loan that is secured by a real estate. The mortgagee will now have to define the terms and the conditions of the loan and consider a collateral to support the mortgage. The mortgagor or borrower will now have to execute a note or a promise to pay or a bond of indebtedness that will signify that there is evidence that will

prove that the debt is secured by a mortgage. In some instances, the note and the mortgage are combined but normally, these two are separated from each other. The note should be considered as negotiable in order for the original mortgagee to be given the chance to assign the note, which is the current practice of most mortgagee lenders. In the case of firms like Fannie Mae and Freddie Mack, they have developed standardized notes that have met the legal requirements of all states in the United States. Any mortgage-lenders will be able to make use of the uniform notes since they contain the provisions that both protect the mortgagor and the mortgagee. In the notes, there should be a set provision that will indicate the acceptable interest rate and the payment scheme for the loan. Such provisions are not mandatory in all federal or state laws but are negotiated between the two parties for the purpose of conforming to the market standards. There are two common due dates for the loans which usually falls on the first of each month, which is after the close of the loan for a period of one full month (Pinkowish, 2011). There are also other things to consider before the note is considered valid and binding. These essential requirements that must be present are: the original signatures of the borrower; the note should be complete and contain all the necessary data; the note should be clean and free from any sign of tampering; there must be an interest rate that should be clearly stated and the payment scheme that should be followed, including the due dates; the date of the note should correspond to the date of the mortgage; and that there must be a specific note that should be applied to the type of loan that was applied such as fixed rate interest or a balloon interest (Pinkowish, 2011). Aside from these basic requirements, borrowers should secure the loan with collateral to be able to execute a mortgage note. The lender shall have the right to use the collateral in the event that the borrower shall

default in payments to be able to recover the losses sustained. The security interest that is normally executed by the borrowers is either a deed of trust or a mortgage. The rationale behind the execution of either of the two documents is to assist the lender or mortgagee to build a lien on the real estate that was taken to form as the security for the debt obtained by the borrower. The mortgage instrument that now becomes the security interest for the lender is not required to be in any specific form, provided that it is in a written form that shall indicate that the purpose for the execution of the instrument is to establish a security interest for the lender or mortgagee. The mortgage does not mandatorily require a defeasance clause. There also some instances when mortgage indicates that the loan is advanced, but the later on requires that the lender shall have a security interest in the real estate. This particular arrangement is known as the “equitable mortgage”.

The primary requisites of a valid mortgage instrument must contain the name of the two parties, the mortgagor and the mortgagee; the words that signify the conveyance or the mortgaging clause, the full amount of the loan; the interest rate and terms of payment; the same provision contained in the promissory notes and bonds; the detailed description of the real estate property; protection clauses for both parties; the date of the mortgage and the note should be the same; the signature of the mortgagor or debtor; and the mortgage document should be notarized to ensure its authenticity; and any other particular requirements depending on the state where it was executed (Pinkowish, 2011).

On the part of the common law, a Deed of Trust was not recognized so the state was required to pass an enabling law for the approval of its use. This deed contained similar features of the mortgage but is different in the conveyance of the title and the procedure for foreclosure. Unlike the mortgage which normally involves only two

parties, the mortgagor and the mortgagee, the deed of trust have three parties to the instrument which are: the lender, the borrower and the trustee. By virtue of the deed of trust, the borrower shall convey the title to the trustee and shall hold the real estate unless the payment of the loan has been fully satisfied, which now requires the trustee to return the title to the borrower. Pinkowish (2011) stated that in effect, the title is held on trust for or for the benefit of the lender.

There should be clauses found in the deed of trust and the mortgage that will serve as a protection for both of the parties in order to resolve foreseeable problems in the future. In the event that the borrower shall default on the payment of the loan, the lender now has the right to foreclose the property. For the foreclosure to take effect, the lender has to file a complaint alleging therein that the borrower, who becomes the defendant, has executed a mortgage that was secured by a real estate; and that such borrower has defaulted on the payment of the debt. Thus, the lender shall seek redress from the court to allow the foreclosure of the real estate in his or her favor. On the part of the defendant-borrower, he or she can allege that there is no mortgage that was executed; the mortgage has been fully satisfied; the interest rate is usurious; or no default ever took place (Pinkowish, 2011). After the court has ruled in favor of the mortgagee, it shall order a decree of foreclosure, which now terminates the right of the mortgagor to the equitable right of redemption at the time of the sale. The mortgagor shall lose all rights pertaining to the real property except the right to receive the excess from the proceeds of the sale after the full payment of the loan to the lender-mortgagee. The only exception allowed by the state is that if an equity of redemption exists. The court is given the authority to order the sale and the manner for which the sale is to be conducted, and the set a minimum bid

price during the sale. The court shall assign an officer, who is usually a sheriff to proceed with the sale after the notice and publication requirements are complied with. In order to attract the bidders or potential buyers, the successful bidder shall acquire the title to the property that is free from any encumbrances except to the statutory right of redemption of the mortgagor (Pinkowish, 2011). The most important part of the foreclosure sale is that there are some states in the U.S. which does not allow the mortgagor to buy back the property since the unencumbered title will cut-off the rights of both the junior lien holders to claim their interest over the property. However, some states allow the mortgagor to repurchase, provided that the previous liens over the real property shall attach. In sum, the essence of foreclosure sale is that the same must be accepted by the court having jurisdiction over the property. This requirement shall serve as a protection to the mortgagor and junior lien holders because the court shall prohibit the sale of the property that is pegged on a price that is unconscionably low (Pinkowish, 2011).

Methods of Foreclosing of the Property

The first method is known as foreclosure by advertisement whereby the clause contained in the foreclosure agreement shall establish the power of sale through an advertisement that will notify the public of the sale. Such method is commonly used for mortgages and deeds of trust because it is less cumbersome compared to the usual court proceeding founded on the clause of the securing instrument. However, this method will not prohibit the mortgagor's right of redemption if applicable. There are some states in the U.S. which disallow the right of redemption if the instrument that was executed to secure the property is a deed of trust. Since, this kind of sale is different for every state in the U.S., the lenders or the mortgagees must be extra careful to comply with the notice or

publication and other mandatory requirements prior to the sale. The distribution of the proceeds of the sale shall follow the same manner for judicial proceedings.

In case the method is strict foreclosure or to undergo the normal court process, the states shall follow the title theory wherein the court of equity shall allow the mortgagor an ample opportunity to exercise the right of equitable redemption. In case the mortgagee shall exercise his or her rights to the property, the court shall decide whether to issue an order in favor of the mortgagee by irrevocably vesting the title of the property, or lose all rights to the property. In this process, the mortgagee has to prove before the court his or her allegations that will justify the grant of the title. There are only two known states in the U.S. which follow the title theory and they are Vermont and Cincinnati.

In other states such as Rhode Island, New Hampshire, Massachusetts and Maine, they use entry and possession as the remedy for a defaulting mortgagor. The mortgagor is notified by the mortgagee that he or she has defaulted in payments and is now ready to take possession of the property. In the event that the mortgagor shall not relinquish the property amicably, the mortgagee can resort to use the judicial method. The law recognizes peaceful possession of the property when the mortgagor has acknowledged that he or she loses all rights over the property by virtue of the default. The peaceful possession should be documented by affidavits executed by witnesses and recorded in writing. The failure of the mortgagor to redeem the property within the period provided by law, the title will automatically be transferred to the mortgagee (Pinkowish, 2011).

An alternative of foreclosure to the foreclosure is the deed in lieu situation which works for both the mortgagor and the mortgagee. In this situation, the mortgagee will execute a deed that will transfer the secured real estate to the mortgagee in lieu of

foreclosure. The benefits of the mortgagee include the immediate acquisition of the title to the real estate for sale and to reduce cost of expenses. On the part of the mortgagor, he or she will not have to undergo the embarrassing situation where the property will be subjected to a foreclosure suit and still be liable for deficiency judgment. According to Pinkowish (2011), the deed in lieu will only be made possible to transfer the title provided that the existing mortgage liability of the mortgagor should have been extinguished. In case the liability of the mortgagors remains, the deed shall be considered as a new security agreement. In the event that the mortgagee will opt to avail of the deed in lieu, the claims of the junior liens will remain. However, it the mortgagee decides to foreclose the property, the rights of the junior lien holders shall be extinguished if the proceeds of the sale will not be sufficient to cover their claims.

The mortgagor still has the right to exercise his right of redemption. The period of redemption of the mortgagor is 6 months to two years which will be dependent on the law of each state. This means that after the bank has foreclosed the property of the mortgagor and became the subject of foreclosure sale, the mortgagor has to right to buy back the property by paying the highest bidder to whom the property was awarded. The purchase price of the highest bidder will be paid by the mortgagor together with other expenses such as back interest. The statutory right of redemption has two objectives: 1.) is to give the mortgagor a chance to buy back his property; and 2.) to encourage the potential bidders to bid at the market value of the foreclosed property (Pinkowish, 2011).

There are also instances that have occurred wherein the proceeds of the foreclosure sale was not sufficient to cover the principal debt of the mortgagor. In this case, the court shall award a deficiency judgment in favor of the mortgagee. Deficiency

judgment is the power of the court to determine of the mortgagor is still liable to pay the difference between the sale price of the property during foreclosure and the actual debt, which is inclusive of principal, interest and foreclosure costs. At present time in American legislation, there are still some states that allow deficiency judgment but it is seldom that courts will render a decision granting deficiency judgments. There are some states in the U.S. which have completely revoked this right of the mortgagee. However, some states which granted this judgment limited the recovery to the difference between the value of the property during the foreclosure sale and the fair market value of the property (Pinkowish, 2011). It will be advantage for the mortgagor to execute a deed of trust rather than a mortgage agreement to preclude the mortgagee to recover a deficiency judgment if necessary.

Mortgage Laws in the U.S.

In a mortgage agreement, the mortgagor and the mortgagee can exercise their right to transfer their interest based on their mortgage agreement. In some occasion, there are some states in America that consider the transfer to have taken effect even when the highest bidder of the property in the foreclosure sale has not yet taken over the foreclosed property, the transfer is deemed to have occurred. Such principle was adopted from the Garn-St Germain Depository Institutions Act of 1982 which has allowed acceleration clauses to be enforceable in every state after the law has become operative. The acceleration clauses in mortgage agreements have allowed the mortgagee to recover the principal debt together with the interest became immediately demandable upon default of the mortgagor. The transfer of the security interest from the mortgagor to the mortgagee is governed by the law of contracts and property based on the mortgage agreement

between the two parties. There are some mortgage agreements that have included due-on-sale clause and due-on-encumbrance clauses that will preclude the transfer of mortgages (Legal Information Institute, 2010).

There are some occasions where the mortgage property that is subjected to foreclosure proceedings has junior liens attached to it. Hence, it will be the duty of the state to determine which among the liens should take preference depending on the state law where the property is located. It shall be the law of the state that will determine which among the liens will be prioritized based on the property interests.

One of the laws that govern mortgages is the Uniform Commercial Code (UCC). Under Article 9 of the UCC, the law provides that manner how conflicts between mortgages founded on real property and liens founded on fixtures shall be governed. This can be clearly illustrated when a personal property is fixed or attached on a parcel of a real property or estate. Pursuant to Article 3 of the UCC, when the mortgage is founded on a negotiable instrument, such mortgage can be considered as a security interest of the mortgage agreement (Legal Information Institute, 2010).

General speaking, the mortgage laws in the U.S. is primarily governed by common law and statutory laws of each state. These mortgages are controlled and being monitored by federal and state law or government agencies that will be determined by the laws of the state where they were established. Since the mortgagees or lenders are commonly the banking institutions, there are specific government offices that are mandated to supervise these banks. To illustrate, the Office of Thrift Supervision, which is considered as an intermediary office in the Department of the Treasury, has to power to monitor the banking activities of federally chartered savings associations (Legal

Information Institute, 2010). In the case of national banks, the designate agency or body that is authorized for the supervision and control is the Comptroller of the Currency charters. While in the case of the federal credit unions, they are under the control and regulation of the National Credit Union Administration (Legal Information Institute, 2010).

Current Crisis in the U.S. Mortgage Laws

According to Immergluck (2009), the recent real estate crisis in America has resulted to foreclosure of properties of those mortgagors who defaulted on their payments. The identified source of the problem is the due to the high-risk lending procedure and the failure of the government to regulate the activities of the lending firms. The lending activities of government-sponsored secondary-market firms such as Fannie Mae and Freddie Mac have caused s significant damage on real estate industry. In the latter part of the year 2008, these two government-sponsored enterprises (GSE) Fannie Mae and Freddie Mac, were investigated by the U.S. Treasury Department for their high-risk lending transactions and were declared for conservatorship for insufficiency of funds to cover their debts. For the past decade, mortgage loans in America became one of the crucial investments due to several economic meltdowns. This view has been supported even by the Wall Street after it took cognizance of the high-risk loans that were distributed all over the U.S. The real estate business started to dwindle after government-sponsored secondary-market firms such as Fannie Mae and Freddie Mac, expanded their mortgage and credit markets giving accommodations on mortgages and home buying. As a result, the construction industry and revenues of the government declined since the real

estate market and property taxes remained uncollected. The valuation of the real estate properties plummeted since majority of the mortgagors defaulted in their payments.

According to Immergluck (2009), as of 2010, even the top lenders in the market which included GMAC Mortgage and some banks such as the Bank of America and JP Morgan Chase discontinued on the foreclosure of mortgages after it was disclosed that majority of the mortgage loans have been approved without undergoing the stringent evaluation of borrowers. As a result, these financial institutions and the banks have agreed to temporarily suspend the high-risk lending transactions as well as the purchase of mortgage-backed securities which initially became the source of funding. Based on the books of the banks and the lending institutions, the default in the payment of the mortgages caused the sharp decline in the values of the real properties (Immergluck, 2009). Such scenario will reveal that the mortgage laws in the U.S. were loosely implemented based on the relaxed screening process of housing loan applications. In fact, it was later on revealed fraudulent housing loans were rampant because there were several bogus buyers who were granted approval of their housing loans without verifying the identity of the borrowers. This modus operandi of fraudulent buyers has affected the U.S. real estate industry. There are several states in the U.S. that have been badly hit by the crisis in foreclosure and the effect of recession caused a major damage in states such as Florida, California, Denver and Nevada (Immergluck, 2009).

General Overview of the Mortgage Laws in Saudi Arabia

According to Hassan and Mahlknecht (2011), the Mortgage Laws in Saudi Arabia has adopted the Execution Law and the classical Shariah principles of "rahn". The principles contained in the mortgage laws are consistent with the teachings of the Shariah in Saudi Arabian Law and enforced by the Board of Grievances. Both the Mortgage Law and the Execution Law are being monitored by the local jurisdictional enforcement agencies, rather than by the Banking Disputes Settlement Committee of the Saudi Arabian Monetary Agency, or also known as the "SAMA" Committee, and the Office of the Settlement of Negotiable Instruments Disputes or called "NIO" (Hassan and Mahlknecht, 2011). The SAMA Committee has the power and jurisdiction to settle disputes that arise between banking institutions and their clients. It can be concluded that although SAMA Committee and NIO have the power and authority to oversee and regulate financing agreements in a particular transaction, the enforcement of the mortgage agreements fall within the jurisdiction of a separate Shariah court. Further, the jurisdictional limitations and boundaries are not clearly defined in the Mortgage Law, the Execution Law and other Financing Law in Saudi Arabia (Hassan and Mahlknecht, 2011).

According to Chance (2012), the Saudi Arabian Monetary Agency or "SAMA" shall exercise the following powers: 1.) The agency can authorize banks to own real estate to target real estate finance, which serves as an exemption to present restrictions imposed by law. This will allow the real estate finance companies to provide real estate financing to those who are interested to purchase properties; 2.) The agency can authorize one or more joint stock companies who will engage in the practice of mortgage refinance

which shall cater to the needs of the present market. Thus, this will enable the secondary market participants to acquire real estate finance assets that shall come from the banking institutions and other real estate companies. This will involve the Public Investment Fund ("PIF") and other recognized financiers that have their own stake, and part of the publicly listed shares; and 3.) The agency can authorize the licensed cooperative insurance companies to extend risks that have connection to the real estate financing based on the existing Cooperative Insurance Companies Control Law (Chance, 2012).

In fact, SAMA is authorized under the law to set the standards and procedures in connection to the real estate financing matters that may include the review of the current legal forms such as the real estate lease agreements. At present, the influx of the new mortgage laws in the country has paved the way for the creation of several provisions which were intended to improve the real estate market by providing enhanced information flow (Hassan and Mahlknecht, 2011). There are also some industry participants who will be placed in better financial positions due to the new government regulation that has deemed the real estate market as a public activity. With the expansion of the law on real estate, the real estate financiers are now allowed to gain access to the records of the courts and the notaries public books of registry. According to Chance (2012), it is within the bounds of the SAMA jurisdiction to define the principles that will govern the institutions to reveal the financing and the costs of the real estate finance products being offered to the public.

Critical Issues Concerning the Arabian Mortgage Laws

There are critical issues in Saudi Arabian mortgage laws that have not provided which court has jurisdiction to resolve mortgage cases. The primary issue is whether the local Shariah Court has the right to enforce mortgage or pledge if the obligation or debt is secured by a mortgage that is interest-bearing and violates Shariah laws. According to Hassan and Mahlknecht (2011), the mortgage law in Saudi Arabia shall apply to real estate and other moveable assets that have a "regular record". Thus, any movable property that does not have a regular record cannot be a subject of the mortgage law. The only noticeable concern in the mortgage laws in Saudi is that they have broader application and are focused mainly to residential housing matters. Both the mortgage law and the financing laws in this country have observed the "Rahn" arrangements under the principles of the Shariah courts. Since the mortgage law is closely connected to residential housing concerns, it can be correlated to the RE Funding Project that covers residential housing initiatives (Hassan and Mahlknecht, 2011).

Effectivity of Mortgage Laws in Saudi Arabia

According to Chance (2012), the Arabian mortgage law at present time has been improved since it has been enacted to create and register real estate mortgages and enforce the rights of both the mortgagor and the mortgagee by defining important concerns that include the assignment, rank, and termination of the mortgage. It is an indispensable requirement that the in order for the mortgage to become effective, the mortgaged property should be registered pursuant to the real estate registration system. Hence, it is imperative that the mortgage should undergo the registration system for the property to be attached. In case the mortgaged property has not yet been registered, there

is another alternative which is required by having the interest of property endorsed on the title deeds as well as the associated registry done through the notaries public and courts of the country. Chance (2012) stated that the mortgage shall become operative the moment is has been registered. The terms and conditions of the mortgage contract should be able to present that has been described in detail so as to prevent the scenario that the subjected property is vague and uncertain, or considered as fraudulent. The registration shall only revolve purely around the mortgage agreement between the mortgagor and the mortgagee. It shall exclude other issues such as the right to enjoy the use and the fruits of the mortgaged property known as the "usufruct" wherein the law shall allow that the property may be independently mortgaged from the rest of the asset (Chance, 2012).

The Mortgage Law in Saudi Arabia refers to the registration of security interests that addresses the rights and privileges of both the registered and unregistered holders of security interests, which determines the prioritization of these interests. The registered mortgage will only become operative or effective against third parties after it has been registered, subject to proprietary rights of third parties or the person who was able to register the mortgage ahead of the others. The party who has registered the mortgage earlier than the others shall have a better right over the mortgaged property. In the determination of the first registrant of the mortgaged property shall be determined by the entry number and the date indicated in the registration record. This concept is based on the principle "race to the counter" system that is currently being practiced within the community of the Gulf Cooperation Council (Hassan and Mahlknecht, 2011).

According to Hassan and Mahlknecht (2011), the classical "rahn" principle has supported this rationale on prioritization that will resolve the issue on who has better right

over the property of the debtor-mortgagor. In Arabian jurisdiction, registration is considered as a part of the traditional "possession by the mortgagee" which is synonymous to the principle of constructive possession. Therefore, it has been clearly shown that the Mortgage Laws in this country have strictly followed the Sharia Court principles in the context of the modern registration system that has been observed globally. Hence, this practice will later on give rise to cases that will need clarification and refinement on issues involving litigation and dispute resolution of parties to a mortgage agreement. The application of decisions in past cases involving similar issues involving mortgage in the Saudi Arabian system has made it complicated to predict the clarification and refinement of the rules of application (Hassan and Mahlknecht, 2011).

"Al-Rhan" Principle of Shariah

Based on the study of Khan and Nisar (2004), the term "Al-rhan" can be translated to its literal meaning "collateral". Al-rahn also refers to an arrangement wherein a valuable asset is offered as collateral for the payment of a debt or obligation. As a general rule, the collateral offered by the debtor can be disposed in case the borrower has defaulted on his or her payments. Al-rahn also pertains to an agreement that requires the asset of the borrower to be delivered to the bank, to serve as a security for the loan. According to Khan and Nisar (2004), collateral refers to a security deposited wherein the borrower is only granted the approval of the loan application if "collateral" is presented to the bank. The bank has made the collateral a requirement in order to secure the loan applied by the borrower prior to the release by the bank of the amount being loaned. According to Khan and Nisar (2004), these securities are deposited as a pledge or a guarantee that the loan are required to be repaid during its maturity. The failure of the

borrower to pay his obligation to the bank will allow the bank to sell the collateral and use the proceeds to reimburse the bank for the loan that was earlier received by the borrower. These collaterals are commonly in the form of papers of security, property documents, certificates, bonds, and checks, shares of stock or official receipts of motor vehicles. Some of the collaterals may be in other forms, where the objects themselves are already presented as collaterals, rather than indicate them in forms or papers. To illustrate this example are the ornaments and other valuables (Khan and Nisar, 2004).

According to Ibrahim (2012), the concept of “al-rahn” is one of the means founded in Shariah for the achievement of the primary objective of Shariah in muamalat, which is to protect and preserve the prosperity, wealth and property of every person. The sure way to attain this objective in accordance to the principles of al-rahn is designed in such a way that the end result will lead to the realization of al-rahn’s own mantra, which aims to safeguard the wealth of the lender or the creditor by making sure that the debtor will be able to pay his or her obligation. This signifies that non-compliance with the rules and principles of settlement of obligation will result to the failure to follow the “rahn” principles. As a consequence, the failure to comply with the principles of al-rahn signifies the noncompliance of the main objective of Shariah in muamalat (Ibrahim, 2012).

Based on the study of Ibrahim (2012), the Shariah has four main objectives for fiqh al- muamalat. The first objective is the circulation of wealth among the people that should be for the purpose of consumption or investment. According to this first objective, no person is allowed to hoard or monopolize the wealth, which should be consumed by all human beings. This is based on the doctrine on the prohibition of “riba”, which disallows accumulation of excessive wealth and domination of wealth.

The second objective is that in order for the acquisition of property to be considered in accordance to the principle of “rahn”, it should be free from any encumbrances, vagueness and ambiguity to keep away from any disputes that could arise among the concerned parties. To be able to avoid this scenario, the parties of the contract are required to include the signature of the witnesses in the agreement or mention their presence as part of their agreement that should be contained in a written form (Ibrahim, 2012). As a general rule, there must be compliance with these two requirements for the valid acquisition of the property. In the absence of these requirements, a specific property may be pledged to represent as a security for a debt (Ibrahim, 2012).

The third objective of the Shariah is the observance of justice and equality among the people to be a mandatory objective in all commercial dealings in Saudi Arabia and other Islamic countries. Pursuant to this objective, every person is required to follow the rules and procedures in order to acquire, spend and invest on real estate properties only through legitimate means (Ibrahim, 2012).

The fourth and the final objective of Shariah in muamalat are to protect the wealth and the property of the people by preventing any transgression or wrongful appropriation performed by any party (Ibrahim, 2012). Henceforth, it is compulsory among every Muslim to follow this objective by heart and upholding the law. Pursuant to this last objective of the Shariah, no person is allowed to make any wrongful or illegal appropriation of property that is rightfully owned by another person. The failure to comply with this fourth objective is a violation of the law that will result to legal sanction. According to Ibrahim (2012), the al-rahn principle of Shariah has given the parties of any agreement to request for a guarantee or for the imposition of compensation

that will serve as a penalty for any non-performance of contractual obligation or breach of contract done by the other party. This will protect the party to the contract who has complied with his or her obligations in good faith. As part of the Muslim faith and culture, it has been a clearly established principle that no Muslim should devour other people's property wrongfully (Ibrahim, 2012).

Application of "Rahn" Principles in the Mortgage Law of Saudi Arabia

According to Hassan and Mahlknecht (2011), the valid contractual provisions contained in the analytical framework of mortgage agreement have observed the following 10 "rahn" principles which are:

1.) The debt of the mortgagor is closely associated to the mortgaged property;
2.) The mortgagee has the right to withhold and keep the mortgaged property;
3.) The mortgagee is duty-bound to safeguard and maintain the mortgaged property;
4.) The mortgagee has to pay the dues and obligations that are related to the mortgaged property;
5.) The mortgagor-debtor is prohibited and the mortgagee-creditor shall not be allowed to sell, lend, lease, mortgage, pledge, donate or place in trust the mortgaged property while the duration of the mortgage is still effective;
6.) The mortgagee-creditor is prohibited to make use of the mortgaged property;
7.) There must be a guarantee to the effect that the value of the mortgaged property should correspond to the debt of the mortgagor;

8.) The mortgagee is not allowed to sell the mortgaged property or to compel the creditor to sell the property for the satisfaction of the debt;

9.) The mortgagee-creditor who is in possession of the property shall enjoy the preference or being a priority creditor who will be paid ahead of the other creditors; and

10.) The mortgagee-creditor has the obligation to return the mortgaged property when the obligation or debt has been fully satisfied by the mortgagor-debtor (Hassan and Mahlknecht, 2011).

Subject of Mortgage

Pursuant to the Mortgage Laws of Saudi Arabia, it refers to real estate properties, but can also be applied to other movable assets such as cars, automobiles, planes and all other vehicles, except securities. It bears stressing that the movable assets that have no regular record cannot be made the subject of a mortgaged agreement. This practice is in keeping with the "rahn" principles that shall cover mortgages and pledges, whether fixed or movable assets (Hassan and Mahlknecht, 2011). The provisions of the mortgage law in this jurisdiction have observed the teachings of the Shariah court. The Mortgage Law will not however prohibit the practice of securing a valid "rahn" over other assets that are not subject to registration, which can be enforceable in Saudi Arabian courts and other administrative or adjudicative bodies. Further, there are other matters of consideration that are consistent with the four orthodox of "Sunni Madhahib" or the schools of Islamic jurisprudence that is connected to the classical "rahn" principles. The classic "rhan" principle has given priority to the mortgagee-lender to enforce his or her claim ahead of the other creditors with respect to the proceeds of the sale of the mortgaged property. The

mortgagee-lender shall be preferred over a third party in successive mortgages involving the same property. The grant of the mortgagor to a third party to claim prior to the mortgagee-lender without the consent of the mortgagee is void. However, if the mortgagee-lender has given consent to the mortgagor to give preference to a third party is inconsistent to the principles of "rahn", by shall be allowed under the Mortgage law. Hence, it can be concluded that there are some provisions in the mortgage law of Saudi Arabia which are not in harmony with the classical principles of "rahn" (Hassan and Mahlknecht, 2011).

Registration and Possession of the Mortgaged Property

It is noticeable that the Mortgage Law in Saudi Arabia has placed an emphasis on the registration of the mortgage to determine its validity and the setting the priority among parties to successive mortgages involving similar properties. The Shariah concept has strictly followed the first party who registered the mortgage enjoys preference over the other parties. The constructive possession shall determine who is to be preferred in the registration process. It bears stressing that there are some "rahn" principles that have supported continuing possession in favor of the creditor-mortgagee in instances where the physical possession is retained by the debtor-mortgagor.

There are two types of registration that are covered by the Mortgage Law: 1.) the registration that is in accordance with the provisions of the system of real estate registration; and 2.) those registrations that did not follow the provisions of the real estate registration system, that were made through countersignature on the record of the property before a notary public or the court (Hassan and Mahlknecht, 2011).

Since there is no central registry of property that is closely monitored along with the registrations with courts and notaries public, due diligence must be exerted to verify the requirements of applicable law with respect to movable properties that are covered by the mortgaged agreement. In the event that mortgaged property has not been registered pursuant to the system, the mortgagor cannot dispose the property within the period of the mortgage, except in the event that both mortgagor and the mortgagee have both agreed to dispose the property (Hassan and Mahlknecht, 2011).

Recent Innovations on the Mortgage Law in Saudi

According to Chance (2012), based on the improved mortgage laws in Saudi Arabia, there are several distinct changes and innovations that have been made been available to real estate financiers that have included: 1.) The capacity to earn the second ranking in the property that has been mortgaged in the event that there are other successive mortgages prior to the party who asserts his or her right over the property; 2.) To be entitled to the right to enforce the undivided share of the partner in the title together with the provision that shall indicate the manner of division of the title deed. The right of the mortgagee is allowed to attach up to the extent of the divided property, and provides right to the mortgagee to demand for the partition and sale of the divided property after the establishment by the mortgagee of his or her right to enforce the secured property has been well-established (Chance, 2012).

In addition, there is an express obligation on the part of the mortgagor to protect the mortgaged property with respect to the mortgagee's right to dispute any concern that pertains to the reduction of the value of the property and to enforce the normal precautionary measures that will ensure the protection of his rights at the expense of the

mortgagor. Another notable change is the “top-up” provision that required that in the event that the valuation of the mortgaged property is reduced to the amount of the debt on the basis of the property misuse on the part of the mortgagor (Chance, 2012). The new remedy is favor of the mortgagee as provided by law, is to demand from the mortgagee to cover for an additional security for the outstanding debt and to shall permit the acceleration, if such condition has not yet been expressly provided in the mortgage. It shall now be the obligation of the mortgagee as a matter of right to file for the application of summary judgment in court to prevent any activity that may harm the value of collateral that has instantly provided the mortgagee to effectively exercise the injunctive relief.

It is noteworthy to mention that there are some provisions in the law that has prohibited the enforceability of the provisions after the declaration that such provisions are null and void even if contained in a signed mortgage contract. The power of the mortgagee to foreclose the property shall extend to the automatic ownership of the property to be able to extinguish the debt and the right given to the mortgagee to use the property on his or her account. The only exclusion to the use of the property is the matters that relate to the income or profit earned from the use of the secured property that may be availed by the mortgagee through collection from the mortgagor and his or her authority to use the income from the property to extinguish a portion of the debt (Chance, 2012).

News Reforms in relation to the Mortgage Laws of Saudi Arabia

According to Chance (2012), there are new reforms that were introduced in order to improve the mortgage system in Saudi Arabia. There are five (5) that have enhanced the Saudi Arabian mortgage and these are: The Real Estate Finance Law, the Finance Companies Control Law, the Registered Real Estate Mortgage Law, the Finance Lease Law and the Enforcement (Execution) Law. Under the Real Estate Finance Law, the law has provided the banks and the finance companies the authority to provide the licensing of banks the capacity to join the real estate finance market, to disseminate information inside the real estate finance market and to enhance the liquidity of the institutions by enforcing measures that will advocate a secondary market and innovative methods that will provide government financial support. This can be achieved with the help of mortgage refinance companies and through securitization (Chance, 2012).

Pursuant to the Finance Companies Control Law, it has structured a framework for the Shariah compliant finance organizations to join the real estate market, together with other banks that shall act as finance providers for real estate and other assets. Some of the alternative forms of finance shall include the lease finance and micro finance that can come from various companies and firm that wishes to enter the real estate business. After the passing of the law through the royal decree has allowed for the creation or establishment of new committee that will hear and decide potential disputes for violation of the Finance Companies Control Law and the Financing Lease Law. This Committee was later known as the Committee for the Resolution of Financing Violations and Disputes, which has been empowered to hear disputes involving matters concerning real estate, except for real estate ownership and securities disputes (Chance, 2012).

Under the Registered Real Estate Mortgage Law, the primary focus for the amendment of the law is to provide a new framework for the establishment of security over real estate that will include second ranking mortgages. This is the very first time that the Mortgage Laws in Saudi Arabia has included such a provision to encourage more lenders to participate in the real estate market (Chance, 2012). Such move is expected to boost the real estate economy in the country.

Another law that is expected to enhance the real estate market in the country is the Finance Lease Law. Based on this law, it has codified the rules pertaining to the finance leasing that also covers real estate, as an effective substitute product to secure a debt. At the same time, the Enforcement (Execution) Law has provided for a new team of committed enforcement judges that has enhanced the process of implementation and enforcement of laws. This measure has defined the enforcement aspect of the court that will clearly identify the powers and jurisdiction of the agencies tasked to implement the laws pertaining to real estate. This has also expanded the kind of enforcement actions that can be brought before the court (Chance, 2012).

Furthermore, there is an amendment to the Capital Market Law that has allowed for the facilitation of the licensing and regulation of special purpose vehicles under the scope of the Capital Market Authority, which had opened the approach so that these vehicles or means of transportation can be used as securitization vehicles and some other valid purpose (Chance, 2012).

Issues Involving the New Reforms in the Mortgage Laws of Saudi Arabia

Based on the study conducted by Chance (2012), there are some major issues that will involve the participation of market players with regard to the implementation of the new reforms in the real estate industry of the country. Some of the identified questions of market participants and observers shall include:

1.) The decision of the court in allowing the debtors or borrowers to approve the mortgage loans with or without collateral;

2.) The effect of the new processes based on the reforms with the compliance with the principles of Shariah (Chance, 2012);

3.) The operation of the registers with regard to the conclusiveness of the records against third parties;

4.) The effect of the new mortgage law system connection with unregistered land;

5.) The reaction of the notaries to the new laws in practice;

6.) Based on the real estate perspective, the effect of the reforms to increase private investment of suppliers;

7.) The effect of the mortgage reforms to the off-plan financing for developers since the new laws are more focused on completed properties;

8.) The ability of the real estate market to provide financing based in longer terms, such as 20-year or 30-year mortgages being implemented in other countries;

9.) The creation of a liquid secondary capital market that will support existing origination of assets; and

10.) The level of government support that will be extended to the borrowers (Chance, 2012).

Comparison of Mortgages laws in United States and Saudi Arabia

Based on the presentation of mortgage laws in the two countries, U.S. and Saudi Arabia, there are several similarities and differences in the manner of enforcement and implementation of mortgage laws are in these two countries.

In both mortgage laws, it is evident that in order for the mortgage to become operative, there must be collateral that will support the mortgaged agreement. In the U.S. mortgage law, the process of mortgaging a property starts with the consent of the mortgagee or the lender to grant the loan that is secured by a real estate. The mortgagee will now have to define the terms and the conditions of the loan and consider the collateral as a security for the loan. The mortgagor or borrower will now have to execute a note or a promise to pay or a bond of indebtedness that will signify that there is evidence that will prove that the debt is secured by a mortgage. Here, the note and the mortgage are allowed to be executed at the same time. But under normal circumstances, these two documentations are separated from each other (Hassan and Mahlknecht, 2011).

On the other hand, in the mortgage laws of Saudia Arabia, it is an indispensable requirement that the in order for the mortgage to become effective, the mortgaged property should be registered pursuant to the real estate registration system. It is an indispensable requirement that before the mortgage becomes operative, the property has to undergo the registration system for the property to be attached. In case of Arabian mortgaged laws, it is a requirement that the mortgaged property has to be registered. According to Chance (2012), if the property has not yet been registered, there is another alternative which is required by having the interest of property endorsed on the title deeds

as well as the associated registry done through the notaries public and courts of the country

Differences between the U.S. Mortgage Laws and the Arabian Mortgage Laws

The primary difference between these mortgage laws in U.S. and Saudi Arabia is that in the Arabian country, its mortgage laws follow the Shariah "rahn" principles. In the U.S. the enforcement and implementation of its mortgage laws does not have to follow any principles in relation to the country's religion. In the enforcement of mortgage laws in Saudi Arabia, the banks, lending and banking institutions have to comply with the 10 "rahn" principles. These principles as stated by Hassan and Mahlknecht (2011) are valid contractual provisions that embody the analytical framework of mortgage agreement between the mortgagor and the mortgagee. The first principle acknowledges the debt of the mortgagor is closely associated to the mortgaged property; The second principle considers that the mortgagee has the right to withhold and keep the mortgaged property; The third principle is that the mortgagee has the obligation to safeguard and maintain the mortgaged property in behalf of the mortgagor; The fourth principle is that the mortgagee is duty-bound to pay the dues and obligations pertaining to the mortgaged property; The fifth principle is that the both the mortgagor-debtor is and the mortgagee-creditor are prohibited to sell, lend, lease, mortgage, pledge, donate or place in trust the mortgaged property while the mortgage agreement is still on-going; The sixth "rahn" principle is that the mortgagee-creditor is barred by law to utilize the mortgaged property; The seventh principle is that there must be a guarantee that the value of the mortgaged property is equivalent to the value of the debt of the mortgagor; The eighth "rahn" principle is that the mortgagee is prohibited by law to sell the mortgaged property or to compel the

creditor to sell the property for the satisfaction of the debt; (Hassan and Mahlknecht, 2011). The ninth principle is that the mortgagee-creditor, who has been given the right to possess the property shall enjoy the preference or being a priority creditor and enjoy the benefit of being paid ahead of the other creditors; and the tenth principle is that the mortgagee-creditor has the obligation to return the mortgaged property the moment that the obligation or debt has been fully paid by the mortgagor-debtor (Hassan and Mahlknecht, 2011). Based on these principles, the mortgage laws in Saudi Arabia have ensured that the provisions are in line with the ideology of the religion or the "rahn" principles. Such requirement is absent in the American mortgage laws.

On the other hand, the Arabian Mortgage Law does not prohibit the practice of securing a valid "rahn" over other assets that are not yet registered (Hassan and Mahlknecht, 2011). The courts, administrative bodies and other tribunals having adjudicatory functions bodies have allowed such procedure provided that these actions are consistent with the four orthodox of "Sunni Madhahib" or the schools of Islamic jurisprudence that has a close connection to the classical "rahn" principles. Based on the classic "rhan" principle, the mortgagee-lender is given the priority right among other creditors to file his or her claim to the full satisfaction of the debt of the mortgagor to be secured from the proceeds of the sale of the mortgaged property. The mortgagee-lender shall be preferred over a third party in the event that there are successive mortgages involving the same property. It bears stressing that any act of the mortgagor that grants a third party to claim ahead of first mortgagor -lender without the mortgagee's consent will be considered void (Hassan and Mahlknecht, 2011).

Another difference between the mortgage laws of U.S. and Saudi Arabia is the courts or tribunal that have jurisdiction over the mortgaged property. In the U.S., the jurisdiction shall depend on the state where the mortgaged property is located. Therefore, the duties and responsibilities of the mortgagor and the mortgagee-lender shall be determined by the laws that are enforced in each state. For every state, they follow different theories such as the title theory, the lien theory or the intermediary theory. The three theories are: 1.) Title Theory; 2.) Lien Theory and Intermediary Theory. The first theory is the title theory wherein the security interest supports the mortgagee. Majority of the states in the U.S. have followed the lien theory, wherein the legal title of the mortgaged property shall stay with the mortgagor, provided that no foreclosure proceeding has not yet taken effect. The third theory is the intermediate theory which means that the lien theory will be applied until such time that the mortgagor has defaulted on the payments on the mortgage. After which, the title theory will be enforced upon the mortgaged property (Legal Information Institute, 2010). Based on the mortgage laws of the Arabian courts, they do not follow these three theories, but rather adopted the Sharian "rahn" principles.

Similarities of Saudi and U.S. Mortgage Laws

Based on the comparison of the mortgage laws in the two countries, they follow the same concept of requiring collateral to form as a security for the loan of the borrower. This practice is common especially if the mortgagee-creditor is a bank. According to Khan and Nisar (2004), the collateral is an important instrument for the security of loan because it gives the banks, lending companies and financial institutions ability to recover

the amount borrowed by the debtor. In effect, the collateral raises the borrower's cost of default and at the same time serves as a disincentive to default (Khan and Nisar, 2004).

In the case of U.S. mortgage laws, it has become a customary practice for the banking institutions to require their borrowers to present collateral before the approval of the loan. On the other hand, several Muslim economists are of opinion that the Islamic system of banking and finance does not necessarily have to require the borrowers to present collateral. These economists argued that the Islamic banks will be able to contribute to the growth and emergence of the economy by allowing these small enterprises to obtain sufficient funding even without the submission of a collateral to secure their loans. It was further explained that since the Islamic banking system is founded on participatory financing, the Islamic banks are not dependent on presence of tangible collaterals, compared to the Western banking system (Khan and Nisar, 2004). It can be observed that the interest-based banking system normally allows credit facilities to their clients who have the capability to provide satisfactory tangible collateral security as part of their benefits. Looking closely at this practice will indicate that in the long run, such banking practice and policy has in fact widened the existing considerable income gap between the upper and lower classes of the society (Khan and Nisar, 2004).

In addition, the existence of collateral requirements has emphasized the dissimilar position of banks when compared to the efficiency of other financial firms (Khan and Nisar, 2004). In fact, several incompetent organizations and firms have the capacity to secure credit by presentation of collateral. In contrast, there are several efficient organizations and firms are not granted with considerable amount of loan for their failure to provide sufficient collateral. Therefore, it is recommended that for Islamic banks, it is

advisable to remove the collateral requirements in order to encourage other investors expand their business. On the part of the Islamic banks, after the removal of the collateral requirements, it is imperative that they screen the borrower's projects or proposals on the basis of their feasibility (Khan and Nisar, 2004).

Based on the reforms made on the Saudi Arabian mortgage laws, the intention of the government is to encourage people to avail of housing loans. According to Chance (2012), it is clear that the intention of the Saudi Arabian mortgage reforms are aimed to sought to provide revisions to the regulatory enforcement as far as the real estate market aspects are concerned. At present, the demographics in Saudi Arabia have shown that there are at least 1.5 million new housing units that have to be built in the coming years. Thus, the government has predicted that there will be a housing-cost inflation in the next few years and will become a significant issue in the future. The old mortgage laws of has made it difficult for the people to avail housing loans. Since the proportion of homes that are being financed continues to be small, many of their people are left with fewer options when it comes to their plans is building homes for their families. According to Chance (2012), due to the absence of finance options offered to their people on home ownership, many of the families living in their country remain to be homeless since they cannot comply with the financial requirements of banks. Majority of the financial companies and lending institutions have required the submission of collaterals to ensure the securitization of the loans. Thus, the recent reforms in the Mortgage Laws in Saudi Arabia are expected to encourage people to participate in the real estate industry.

Based on the report of Fattah (2012), home lending transactions in Saudi Arabia have significantly increased at its quickest pace during the last four years. This was evidenced by the giant leap endeavored by the large banks of Saudi Arabia since they intensified the real estate economy by accepting to take more risks after the reforms were made in Saudi Arabia mortgage laws. It is important to note that the real estate financing has risen to at least 83 percent to mark the record of 48 billion riyals at the end of the year based upon verification with the records of the central bank. This was a result of the 4 percent home purchases in Saudi Arabia that have received funding through real estate mortgage loans. At present, majority of the home buyers were able to purchase their new houses after receiving help from the savings of their families (Fattah, 2012). The Arabian government's agency called the "Real Estate Development Fund" was able to grant the less privileged citizens, who are considered as low-income buyers to avail of housing loans that are not interest-bearing.

After the close comparison of the mortgage laws in these two countries, it is clear that the U.S. mortgage laws are well-established in terms of their requirements, the enforcement of laws and the process of mortgage and the methods of foreclosing of the property in event of default on the part of the mortgagor. The method of foreclosure through advertisement can only be made possible if there is a provision in the contract that has allowed the right of the mortgagee to choose this method. In the case of the mortgage laws in Saudi Arabia, this method of power of sale through an advertisement is not present. In fact, since it is only in the year 2012, when the Arab country has instituted reforms on their mortgage laws (Fattah, 2012).

Unlike in the mortgage laws in the U.S., it has been well-established practice to use mortgages and deeds of trust between the mortgagor and the mortgagee which has been considered as a less cumbersome option, when compared to the normal court proceedings.

In addition, the mortgage laws in Saudi Arabia do not give the mortgagor the right of redemption in the event that there was default in the payment of his obligation. Although not all the states in the U.S. has allowed this benefit for the mortgagor, there are still some states which prohibited the right of redemption on the mortgagor if the instrument that was executed to secure the property is a deed of trust (Pinkowish, 2011). Based on this uncommon sale transaction, the lenders or the mortgagees in the U.S. have become more cautious in their compliance with the notice or publication, as well as other mandatory requirements before the sale of the mortgaged property is allowed. The distribution of the proceeds of the sale in the order of the preference of creditors has observed the same manner for judicial proceedings. It is also noteworthy to mention that the mortgagors in the U.S. have been provided with several options or remedies in case their mortgaged properties were foreclosed.

In the mortgage laws of Saudi Arabia, it is evident that the provisions on mortgage will still have to be clearly defined in terms of strict foreclosure or to undergo the normal court process, after the mortgagor has defaulted. In the U.S. several of the states have observed the practice based on the title theory wherein the court of equity shall allow the mortgagor an ample opportunity to exercise the right of equitable redemption (Pinkowish, 2011). This practice is not expressly mentioned in the mortgage laws of Saudi Arabia.

Conclusion

It can be concluded that the main difference in the mortgage laws of the two countries is primarily based on the culture and religion of their people. The main reason why the real estate business in Saudi Arabia has not yet been fully developed is due to the strong influence of their religion and culture in their banking systems. The primary consideration of the mortgage laws in Saudi Arabia has concentrated on following the concept of "al-rahn" which is founded in Shariah for the achievement of the primary objective of Shariah in muamalat. The Shariah "al-rahn" principle has believed in the protection and preservation of prosperity, wealth and property of human beings (Khan and Nisar, 2004). The sure way to attain this objective in accordance to the principles of al-rahn is designed in such a way that the end result will lead to the realization of al-rahn's own mantra, which aims to safeguard the wealth of the lender or the creditor by making sure that the debtor will be able to pay his or her obligation. This signifies that non-compliance with the rules and principles of settlement of obligation will result to the failure to follow the "rahn" principles.

Thus, it can be concluded that the mortgage laws in the Western banking system such as in the U.S. is more developed than in other Islamic countries such as in Saudi Arabia. There is truth in the theory of Muslim economists who stated that the Islamic system of banking should not be as conservative as the laws in the U.S. Hence, the mortgage laws in Saudi Arabia should not be as strict as the implementing rules of U.S. mortgage laws. It is recommended that in the case of application of loans of small borrowers in Arab countries, it is not necessary to require the borrowers to present collateral. These economists argued that the Islamic banks will be able to contribute to

the growth and emergence of the economy by allowing these small enterprises to obtain sufficient funding even without the submission of collaterals to secure their loans. As further explained by the economic experts, since the Islamic banking system is founded on participatory financing, the banks are should not be dependent on presence of tangible collaterals, compared to the Western banking system (Khan and Nisar, 2004). It can be observed that the interest-based banking system normally allows credit facilities to their clients who have the capability to provide satisfactory tangible collateral security as part of their benefits. Looking closely at this practice will indicate that in the long run, such banking practice and policy has in fact widened the existing considerable income gap between the upper and lower classes of the society (Khan and Nisar, 2004). After careful examination of the past studies concerning the mortgage laws in Saudi Arabia, these weaknesses can be avoided through the proposed measures in order to bridge the gap between the upper and lower classes of the society.

Creation and implementation of laws is a very sensitive issue in any country because of its impacts in the society. The sensitiveness of mortgage laws, with regard to its impact on the economy and well-being of people, makes it one of the controversial laws. Generally, various studies have been carried out on law implementation in various countries, and the impacts of the process in the society entirely. With the institution of reforms in the mortgage laws in Saudi Arabia, it is expected that the real estate system in the country will expected to grow in the coming years. According to Chance (2012), based on the new reforms made on the mortgage laws of Saudi Arabia, the legislative sweep of amendments and enactment new revisions in the real estate laws are impressive. However, despite these changes, the enforcement of the law and the effect on the real

estate business remains to be unseen. It gives the people and investors a sense of hope since the new laws have created a legal environment that continue to attract private capital investment to the present limited real estate finance market. It is expected that it will take time to establish the foundations of these revisions because the consensus of the people has shown that it will not just be a matter of overnight success in the real estate industry. The new reforms serve as a welcome move on the part of the government to initiate evolutionary changes in the right direction (Chance, 2012).

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